



Published on *United States Bankruptcy Court* (<http://www.canb.uscourts.gov>)

[Home](#) > Memorandum of Decision Re: Priority of Liens

Monday, July 6, 1987

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

DOLORES P. SEYMOUR,

No. 1-86-00373

[Debtor](#) .

_____/

DOLORES P. SEYMOUR,

[Plaintiff](#) ,

v.

A.P. No. 1-87-0036

AMERICAN SAVINGS

& LOAN ASSOCIATION,

[Defendant](#) .

_____/

ORDER GRANTING SUMMARY JUDGMENT

FACTS

Debtor Dolores Seymour and her husband have been married since 1954. In 1979, they purchased a residence in Nevada and took title to it as community property. In late 1981, a third party obtained a judgment against the debtor's husband based upon his business activities. The judgment [creditor](#) obtained a writ of execution and in late 1982 the right, title and interest of the debtor's husband in the Nevada property was sold to the judgment creditor at the sheriff's sale. On November 17, 1983, upon expiration of the one-year redemption period, a sheriff's deed was recorded transferring the husband's interest to the judgment creditor. In September, 1982, at a time subsequent to the issuance of the writ and before the sheriff's sale, the debtor and her husband borrowed \$450,000.00 from State Savings & Loan Association and gave a deed of trust to the Nevada property to secure their note. State Savings knew about the judgment and the writ, but agreed to make the loan if sufficient funds were retained by the title company to take care of the judgment if it became necessary. The title company negligently allowed the sale to take place and the redemption period to run. In early 1984, in return for full satisfaction of the judgment, the judgment creditor executed a deed which purported to convey the property to both the Seymours. The Seymours then transferred ownership of the property to a corporation they owned, taking a note from the corporation secured by a deed of trust to the property. The issue raised in this [adversary proceeding](#) is whether the [lien](#) of State Savings (now held by defendant American Savings) is senior to the debtor's lien. While the debtor wants to argue about the estate's rights under section 544 (a)(3) of the [Bankruptcy Code](#) and the doctrine of after-acquired property, the court finds that the debtor has held her interest in the property continuously since 1979, and accordingly grants summary judgment to defendant.

SECTION 544(a)(3)


The court has serious reservations about the applicability of section 544(a)(3) to this matter. That section was intended to give the debtor's estate certain powers regarding the debtor's real property; the debtor here holds a note, which is personal property notwithstanding being secured by real property. In re Staff Mortgage & Investment Corp. (9th Cir.1980) 743 F.2d 281. While the court in Matter of Phillips (Bkrcty.D.Conn.1982) 21 B.R. 565, did apply section 544(a)(3) to a note and mortgage, it did so without really recognizing or dealing with the issue. That case can also be distinguished on the basis that it dealt only with ownership of the note, not priorities among liens. It is apparent to the court that even if section 544(a)(3) can be used to avoid unperfected senior liens, it is irrelevant to this case for two reasons. First, as hereafter noted, the court finds that the debtor was not deprived of her interest in the property by the sheriff's sale. Second, even if her interest had somehow been conveyed by the sheriff there is still sufficient cloud on the title to make 544(a)(3) irrelevant. In order to survive attack under 544(a)(3), the lien or interest need not be flawlessly noticed; it is sufficient that any document in the public record clouds title to the property. In re Elin (Bkrcty. D.N.J.1982) 20 B.R. 1012 (aff'd 707 F.2d 1400); In re Gurs (9th Cir.BAP 1983) 27 B.R. 163. Since there is nothing in the record to reflect a transfer of the debtor's interest in the property to the judgment creditor, the State Savings deed of trust would still cloud the property's title even if the debtor had somehow been divested of her interest in the property.

EFFECT OF SHERIFF'S DEED

The fatal flaw in the debtor's case is her argument that she was divested of her interest in the property by the sheriff's sale. The sheriff's deed purports to convey nothing more than her husband's interest in the property. While the debtor's interest in the property may have

been liable for satisfaction of the judgment, the judgment creditor made no effort to enforce the judgment against her interest. The fact that the judgment creditor deeded the entire property back to the Seymours does not establish that he actually owned the entire property.

ORDER

Based upon the foregoing findings and conclusions, and it appearing that there is no triable issue of fact, it is hereby ORDERED that the motion of defendant American Savings for summary judgment is granted, and said defendant shall be entitled to a judgment declaring that it has a valid lien on the one-half interest in the property formerly owned by the debtor, which lien is senior to that presently held by the debtor. The court makes no ruling as to the effect of the lien of American on the half formerly owned by the debtor's husband, although the value of the property may render that issue moot and, in any event, that issue is presently before the bankruptcy court in Utah where the [Chapter 11](#)  proceedings of the debtor's husband are now pending. Counsel for defendant shall prepare and submit a separate form of judgment in accordance with this order.

Dated: July 6, 1987

ALAN JAROSLOVSKY

U.S. [BANKRUPTCY JUDGE](#) 

Source URL (modified on 11/12/2014 - 3:42pm):

<http://www.canb.uscourts.gov/judge/jaroslovsky/decision/memorandum-decision-re-priority-liens>